



Commonwealth of Massachusetts State Ethics Commission

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CONFLICT OF INTEREST OPINION EC-COI-93-3*

FACTS:

You and Joseph F. Zgrodnik^{1/} are both elected members of the Hadley Planning Board (the Board). Cumberland Farms, a convenience store chain, has applied to the Board for a special permit approving its site plan to expand its existing use on a parcel of land it owns in Hadley. The Board may issue the special permit only if four of its five members so vote. G.L. c. 40A, §9, tenth paragraph.

Both you and Dr. Zgrodnik are also members of the Board of Trustees of Hopkins Academy (the Academy). The Academy owns land immediately abutting the subject Cumberland Farms parcel.

QUESTION:

May you and Dr. Zgrodnik participate in the Board's consideration of and vote on this special permit?

ANSWER:

Yes, by virtue of the rule of necessity.

DISCUSSION:

Section 19(a) of G.L. c. 268A, in relevant part, generally prohibits a municipal employee from participating in a particular matter in which he knows that he, or a business organization in which he is serving as "trustee," has a financial interest. As Board members, you and Dr. Zgrodnik are "municipal employees."^{2/} The application for this special permit and the Board's decisions about it are "particular matters."^{3/} The Academy is a "business organization"^{4/} of which you and Dr. Zgrodnik are trustees.

In previous opinions, we have presumed that an abutter of a parcel that is the subject of a particular matter has a financial interest in that matter. *See EC-COI-89-33; 84-96.*^{5/} Here, the Academy is an abutter, and you and Dr. Zgrodnik are among its trustees. Therefore, in the absence of evidence that rebuts this presumption by showing clearly that the Board's decision will not (positively or negatively) affect the value of the Academy's abutting land, §19 would ordinarily prohibit both of you from participating in this matter.^{6/}

Here, however, the Board may issue the special permit only if four of its five members so vote. G.L. c. 40A, §9, tenth paragraph. If neither you nor Dr. Zgrodnik may participate, the Board would be unable to issue the special permit.^{7/} Thus, we must consider whether the "rule of necessity" allows both of you to participate despite §19.

The courts have established the rule of necessity to allow public officials to participate in official decisions from which they are otherwise disqualified by their bias, prejudice, or interest, when no other official or agency is available to make the decision. *See, e.g., Mayor of Everett v. Superior Court*, 324 Mass. 144, 151 (1949); *Moran v. School Committee of Littleton*, 317 Mass. 591, 593-94 (1945). Otherwise, the legislative purpose in having an important public decision made would be frustrated. *See* 3 K. Davis, *Administrative Law Treatise* §19:9 (2d ed. 1980); 38 A. Cella, *Mass. Practice: Administrative Law and Practice* §321 (1986).

We have previously applied the rule of necessity to G.L. c. 268A. *E.g., EC-COI-92-24; 82-10; 80-100.* *See Graham v. McGrail*, 370 Mass. 133, 138 (1976) (suggesting that rule would apply to G.L. c. 268A in

proper circumstances). In each case, we have stressed the narrow circumstances in which the rule of necessity may be invoked: for example, that no other qualified tribunal can be found, and that the governmental body's inability to act is not due in part to the mere absence or illness of a member.

We have also sometimes referred to the body's inability to obtain a "quorum," usually a majority of its members, because in the circumstances we have so far considered, that was the number of members required for the body to act. See *EC-COI-92-24*; *82-10*. Here, we must instead consider a statute that requires a "super-majority" to accomplish one of the possible outcomes.^{8/}

The very case in which the Supreme Judicial Court formulated a rule of necessity in Massachusetts involved just such a "super-majority" requirement. In *Moran v. School Committee of Littleton*, 317 Mass. 591 (1945), a teacher challenged his removal, asserting that two of the three voting School Committee members were disqualified because they had earlier testified at the Committee's removal hearing. The statute required a two-thirds vote of the entire Committee for removal. The court held that the challenged members were entitled to participate under a rule of necessity that it established in these terms:

The general rule is that a member of an administrative board who is biased or prejudiced against one on trial before the board is not required to withdraw from the hearing if no other board can hear and determine the matter, especially if his withdrawal would deprive the board of **the number of members required to take a valid affirmative vote**.

Id. at 593 (emphasis added).^{9/}

Although the *Moran* case preceded the conflict law's enactment, the court's later *Graham* opinion cites *Moran* as authority for the rule of necessity that *Graham* then suggests may apply to G.L. c. 268A. 370 Mass. at 138.^{10/} This formulation of the rule is also consistent with the rule's purpose as stated in our prior opinions. See *EC-COI-92-24* (rule "permits governmental bodies to act when they would otherwise [be] forced to forego their governing responsibilities"); *EC-COI-82-10* (rule did not apply because "remaining members could approve the matter before them by a majority vote"). See also *Graham*, 370 Mass. at 140 ("if the step can be taken without the member's participation, he must not participate"); note 8 *supra* (discussing *EC-COI-84-96*).

Disqualifying both you and Dr. Zgrodnik "would deprive the [B]oard of the number of members required to take a valid affirmative vote." Therefore, the rule of necessity applies here.^{11/} In order to invoke the rule, and to comply with §23(b)(3) of G.L. c. 268A,^{12/} both of you must first publicly disclose your capacities as Academy trustees and the Academy's presumed financial interest in this matter.^{13/} The Board's minutes should reflect that the rule of necessity was invoked to allow both of you to participate.^{14/} See *EC-COI-92-24*. Both of you may then participate fully in this matter.^{15/}

DATE AUTHORIZED: January 26, 1993

* Pursuant to G.L. c. 268B, §3(g), the requesting person has consented to the publication of this opinion with identifying information.

^{1/}Dr. Zgrodnik has authorized you to obtain this advice on his behalf.

^{2/}The conflict law's definition of "municipal employee" includes "a person . . . holding an office . . . or membership in a municipal agency . . . by election . . . without compensation, on a . . . part-time [or] intermittent basis . . ." G.L. c. 268A, §1(g).

^{3/}"Particular matter" is defined to include "any judicial or other proceeding, application, submission, request for a ruling or other determination, . . . decision, determination, finding . . ." G.L. c. 268A, §1(k).

^{4/}Although the Academy is a non-profit corporation, this Commission and the Attorney General before us have consistently concluded that non-profit organizations that do business are "business organizations" for this purpose. See *EC-COI-88-4* and authorities cited.

^{5/}The cited opinions also apply this presumption to a person entitled to notice of the matter under the Zoning Act (G.L. c. 40A, §11), or a "person aggrieved" by the matter under the Wetlands Protection Act.

⁶As elected officials, no exemption under §19(b)(1) is available to you. See *District Attorney v. Grucci*, 384 Mass. 525, 528 n.3 (1981).

⁷It is true that G.L. c. 40A, §9 also provides that a special permit is constructively granted if the Board does not act within ninety days of its public hearing (or whatever additional time the Board and applicant may agree). Thus, it might be argued that the remaining three Board members could effectively decide to issue the permit simply by taking no action within the required time. This, however, would deprive the Board of its ability to impose conditions in issuing the permit (an outcome you inform us the Board often favors), and the absence of written reasons for the permit might well compromise the Board's defense of its decision in court.

⁸In *EC-COI-84-96*, we considered the same statutory requirement that four members of a five-member Planning Board approve a special permit. There, we concluded that the rule of necessity did not apply, because only one member was disqualified by §19. We strongly suggested the result we reach today, however, when we advised the sole disqualified member: "you would only be able to participate if **another member** were disqualified from participation and not merely absent from the Board meeting at which the matter is considered. The fact that there may not be unanimous agreement among the four remaining member[s] as required by G.L. c. 40A, §9 is not a reason to invoke the rule of necessity." (emphasis added)

⁹The court went on to hold, apparently as an alternative rationale, that the two members were not disqualified by testifying. 317 Mass. at 594-95.

¹⁰That the *Moran* formulation of the rule remains good law is also suggested by the Appeals Court's recent quotation of it, again in a context not explicitly invoking G.L. c. 268A. *Town of Georgetown v. Essex County Retirement Board*, 29 Mass. App. Ct. 272, 277-78 (1990).

¹¹In general, before invoking the rule of necessity, public employees should receive written advice (such as this opinion) either from municipal counsel or this Commission, because participation based on improper reliance on the rule would violate G.L. c. 268A. See *EC-COI-92-24*.

¹²Section 23(b)(3) prohibits a public employee from engaging in conduct that gives a reasonable basis for the impression that any person or entity can improperly influence him or unduly enjoy his favor in the performance of his official duties, but allows the employee to dispel any such impression by written public disclosure.

¹³Prior Commission opinions under §23(b)(3) suggest disclosure both in writing to the Town Clerk and orally at the first relevant Board meeting for inclusion in the meeting's minutes. *EC-COI-91-3*; 90-2. Both of you should follow that procedure here.

¹⁴When the rule of necessity applies, all members may participate, regardless of the nature of their conflicts. See *EC-COI-92-24*. The rule, of course, does not require any member to participate or to vote for a particular outcome; it merely creates the opportunity for a board to make an affirmative decision.

¹⁵Other provisions of the standards of conduct for all public employees in §23 of G.L. c. 268A apply to you and Dr. Zgodnik's participation in this matter, however. Thus, §23(b)(2) provides that no public employee may use or attempt to use his official position to secure unwarranted privileges of substantial value for himself or others. This provision requires both of you to apply the same objective standards to this matter that you apply to all other matters, without allowing your affiliation with the Academy to influence your judgment. See *EC-COI-92-38*; 89-23; 89-3. In addition, §23(c)(2) prohibits a public employee from disclosing confidential material or data acquired by him in his official duties. Confidential materials are those not contained in a "public record," as defined in G.L. c. 4, §7(26). Thus, neither of you may disclose confidential information about this or any other matter that you may acquire as Board members.